IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0388
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
STEVEN LEON WAGGONER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051781

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diana Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

P E L A N D E R, Chief Judge.

¶1 After a jury trial, Steven Waggoner was convicted of possession of a narcotic drug, a class four felony, and possession of drug paraphernalia, a class six felony. Based on

its finding Waggoner had two prior felony convictions, the trial court sentenced him as a repetitive offender to concurrent, presumptive prison terms of ten years and 3.75 years on these convictions, respectively. On appeal, Waggoner contends the trial court erroneously denied his motion to suppress evidence found on his person and in the vehicle he was driving at the time of his arrest. We affirm.

¶2 In reviewing the denial of a motion to suppress evidence, we consider only that evidence adduced at the suppression hearing and view the facts in a light most favorable to upholding the trial court's ruling. *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). We review the ruling "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶3 On an April afternoon in 2005, Tucson police officers conducted surveillance of a residence known for illegal drug activity. When a truck that had pulled into the residence left less than ten minutes later, Officers Richard Legarra and Lisa Cunningham quickly positioned their shared patrol car, driven by Legarra, behind the truck and followed it. Cunningham testified that while following the truck, she saw it "weaving back and forth," including "crossing over the double line into the on-coming lane." Cunningham saw this occur "two [or] three times," and each time, "at least the wheel well . . . , maybe a quarter of [the] vehicle" crossed over the center dividing line and stayed there "maybe five to ten seconds" before the truck fully returned to its own lane. Legarra also testified he had seen

the vehicle "weaving and driving left of center" and "cross[ing] over into the on-coming lanes," but could not recall how many times this had occurred or how long the vehicle had remained over the center dividing line. Although their testimony conflicted as to which of them had decided to stop the vehicle, both Cunningham and Legarra testified Legarra had activated the patrol car's emergency lights and stopped the truck based on its having crossed the center line. Soon thereafter, Officer Frank Carrizosa, a third officer who had been involved in the surveillance operation, also arrived on the scene.

¶4 Legarra approached the driver's side of the truck and soon learned Waggoner was the driver. Carrizosa remained by the driver's side of the vehicle while Legarra returned to his car to run a records check. Meanwhile, Cunningham had made contact with a passenger and had asked her to step out of the vehicle on the passenger's side. When the passenger did so, Carrizosa saw a "crack pipe" on the seat that had been "between her legs" before she stood up. Carrizosa told Legarra and Cunningham about the pipe he had seen, and Legarra placed Waggoner under arrest. Searches of the vehicle and Waggoner's person led to the discovery of an additional crack pipe in Waggoner's "left front pant's pocket" and a rock of crack cocaine in the glove compartment. Legarra agreed on cross-examination that making a traffic stop had been the officers' purpose in following Waggoner's vehicle after it had been seen at the home they had been surveying. Carrizosa similarly acknowledged the general use of this tactic after a "stake-out."

¶5 Waggoner moved to suppress this evidence on the ground the officers lacked reasonable suspicion he had committed a traffic violation, despite his having allegedly "crossed the dividing lane . . . a few times." Quoting this court's decision in *State v. Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d 1103, 1106 (App. 2003), he also questioned the officers' credibility, arguing their ulterior motives in making the stop were relevant to "'the threshold question of whether [they] had actually witnessed a traffic violation.'" (Alteration supplied.) He reasserts these arguments on appeal.

¶6 An investigative stop is lawful "if the officer has articulable, reasonable suspicion, based on the totality of circumstances, that the suspect is involved in criminal activity." *State v. Box*, 205 Ariz. 492, ¶ 16, 73 P.3d 623, 628 (App. 2003); *see also United States v. Arvizu*, 534 U.S. 266, 273-74, 122 S. Ct. 744, 750-51 (2002); *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1879-80 (1968). A "violation of a traffic law provides sufficient grounds to stop a vehicle." *State v. Acosta*, 166 Ariz. 254, 257, 801 P.2d 489, 492 (App. 1990). The constitutionality of such stops under the Fourth Amendment to the United States Constitution is not determined by the subjective motivations of the officers involved. *See Jones v. Sterling*, 210 Ariz. 308, ¶ 10, 110 P.3d 1271, 1274 (2005), *citing Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996). Accordingly, "evidence seized as a result of a traffic stop meeting 'normal' Fourth Amendment standards is not rendered inadmissible because of the subjective motivations of the police who made the stop." *Id.* ¶ 11. Although an officer's ulterior motives in making a stop are "relevant to

the officer's credibility," *Livingston*, 206 Ariz. 145, ¶ 13, 75 P.3d at 1106, the use of objectively justified "pretextual" traffic stops have withstood constitutional scrutiny. *Whren*, 517 U.S. at 814, 116 S. Ct. at 1174-75.

¶7 The state contended below, as it does on appeal, that Leggara and Cunningham observed a violation of law that independently justified the stop when Waggoner crossed over the center line into the oncoming lane. It draws our attention to the statute addressed by *Livingston*, A.R.S. § 28-729(1), that requires a motorist to "drive a vehicle as nearly as practicable entirely within a single lane" when traveling on a divided roadway. Waggoner contends his alleged actions did not violate the statute under its construction in *Livingston*, a decision the state, in turn, argues is not only inapposite, but one we should disavow as incorrectly decided.

¶8 Although we do not share the state's view that *Livingston* is "erroneous as a matter of law," we agree that its facts are distinguishable from those present here. In *Livingston*, we upheld a trial court's grant of a motion to suppress evidence seized after the driver had been stopped for an alleged violation of § 28-729(1). 206 Ariz. 145, ¶¶ 1-2, 75 P.3d at 1104. The driver had allowed the right side tires of her car to momentarily cross the shoulder line one time while driving along a stretch of highway described as "rural, curved, and dangerous." *Id*. ¶¶ 4-7. The driver had neither woven back and forth nor overcorrected after the tires had crossed onto the road's shoulder, nor had the tires crossed beyond the shoulder's paved portion, which was merely twelve inches wide. *Id*. ¶ 5. In light of both

the nature of the roadway and the driver's otherwise lawful operation of the vehicle, and because § 28-729(1) required a driver to remain in his or her lane only "as nearly as practicable," we found "the trial court did not abuse its discretion when it found that Livingston committed no violation and implicitly found that the officer had lacked a reasonable basis for the stop." *Id.* ¶ 12. Contrary to the state's claim that we thus "equated" lack of an actual violation of a statute with lack of a "reasonable belief of a violation," we reasoned, instead, that the trial court was within its discretion when it found the driver's single, momentary breach of the shoulder line *not only* did not constitute an actual violation of the statute, *but also* had failed to arouse even a reasonable suspicion that the statute had been violated. *Id.*

¶9 The circumstances are vastly different here. Two officers testified Waggoner had crossed over the center line into an on-coming lane, not merely on to the shoulder of the road. One of them recalled with specificity that this had occurred two to three times for periods of five to ten seconds and that up to one-quarter of the truck had crossed over. Unlike in *Livingston*, none of the evidence suggested that any characteristic of the roadway made any breach of the lane lines reasonable, let alone repeated breaches into a lane reserved for oncoming traffic. As we recognized in *Livingston*, "seemingly small factual distinctions can affect a court's conclusions as to the reasonableness of a stop." *Id.* n.1. Moreover, our statutes require a driver not only to maintain a vehicle within one lane "as nearly as practicable," § 28-729(1), but more stringently demand that "a person shall drive

a vehicle on the right half of the roadway" with few exceptions, none of which is applicable here. A.R.S. § 28-721(A). Accordingly, the evidence supports the trial court's implicit conclusion that the officers had a reasonable basis for the stop.[1] Thus, the stop did not infringe upon Waggoner's Fourth Amendment rights.[2]

¶10 That Legarra and Cunningham each attributed to the other the decision to initiate the stop does not dissuade us. Legarra was an officer in training with Cunningham, and the trial court might reasonably have regarded this conflict in their testimony as a mere perceptual difference in the distribution of responsibility during the unfolding circumstances of the stop. Moreover, the testimonial conflict goes solely to the weight and credibility of witnesses' testimony, determinations reserved for the trial court and upon which we do not intrude. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004) (trial court determines credibility of witnesses); *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).

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[1]The trial court's under advisement ruling announced without elaboration only that the motion to suppress evidence was denied.

[2]We also reject Waggoner's assertion that the stop violated his "broader" right to privacy under article II, § 8 of the Arizona Constitution. *See State ex rel. Ekstrom v. Justice Ct.*, 136 Ariz. 1, 3, 663 P.2d 992, 994 (1983) (stop based on reasonable suspicion "'is permissible if it meets the test enunciated in *Terry*'"), *quoting State v. Axley*, 132 Ariz. 383, 390, 646 P.2d 268, 275 (1982); *see also State v. Tykwinski*, 170 Ariz. 365, 371, 824 P.2d 761, 767 (App. 1991) ("both the fourth amendment . . . and art. 2, § 8 of the Arizona Constitution, protect motorists from 'harassment by government agents'"), *quoting Ekstrom*, 136 Ariz. at 2, 663 P.2d at 993.

¶11 Waggoner also claims the police lacked probable cause to arrest him and that the evidence seized upon the searches of his person and vehicle incident to that arrest also should have been suppressed. He rests these contentions on his continuing attack of the officers' credibility. Essentially, he contends the officers' testimony was so lacking in credibility as to have rendered the trial court's implicit factual findings an abuse of discretion. Because the record supports the trial court's ruling, we find no abuse of discretion and defer to the court's implicit findings. *See State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

¶12 Waggoner emphasizes, for example, that Legarra's testimony conflicted with Carrizosa's on the location of the pipe discovered in the officers' plain view, which Legarra testified had been the basis for his arrest and search of Waggoner. Legarra testified on cross-examination that in his report, he had stated Carrizosa had informed him he had seen a crack pipe in "Mr. Waggoner's lap." Carrizosa, however, testified the pipe he had seen had been between the passenger's legs, out of view until she stood up, leaving it behind on the seat. Cunningham's testimony corroborated Carrizosa's, at least in the sense that she recalled Carrizosa's drawing her attention to a pipe on the seat after Cunningham had removed the passenger from the vehicle. In addition, the passenger was Waggoner's wife and shared his last name.

¶13 Under these circumstances, we find no abuse of discretion in the trial court's apparent conclusion that the conflicting testimony was not so inexplicable or internally

inconsistent as to deal a fatal blow to the officers' credibility. Unless a trial court's factual findings are unsupported by the record or clearly erroneous, we defer to them. *See Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d at 453. Applying this deference, we are left with credible evidence that an officer observed a crack pipe in plain view in a truck controlled by Waggoner and that its discovery prompted the arrest and subsequent searches at issue here. An arrest is justified where probable cause exists to believe the person to be arrested has committed an offense. *State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000). As the state points out, Waggoner does not dispute that the discovery of a crack pipe on the seat supplied probable cause to arrest him and search his person and vehicle.

¶14 Finding no error in the trial court's denial of the motion to suppress evidence, we affirm Waggoner's convictions and sentences.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge